No. 99-1408

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In The

Supreme Court of the United States

GAIL ATWATER, Individually, and MICHAEL HAAS as next friend of ANYA SAVANNAH HAAS and MACKINLEY XAVIER HAAS,

Petitioners,

v.

CITY OF LAGO VISTA, BART TUREK and FRANK MILLER,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* TEXAS CRIMINAL DEFENSE LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Texas Criminal Defense Lawyers Association (TCDLA) is a Texas non-profit corporation with a membership of more than 2000 attorneys covering the State of Texas. TCDLA was organized almost three decades ago with the stated purposes of protecting and ensuring by rule of law those individual rights guaranteed by the Texas and Federal Constitutions in criminal cases, to resist efforts to curtail such rights, to encourage cooperation between lawyers engaged in the defense of citizens accused of crimes through educational programs and other assistance, and through such cooperation, education and assistance to promote justice and the common good.

STATEMENT

Amicus adopts petitioners' statement.

SUMMARY OF ARGUMENT

A full custodial arrest for a traffic citation is unreasonable under the Fourth Amendment for two reasons. First, the common law at the time of the adoption of the Fourth Amendment did not support a full custodial arrest for fine-only offenses such as those used to regulate our

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[1] Letters from the parties consenting to the filing of this brief are on file with the Clerk of this Court in accordance with SUP. CT. R. 37.3. Pursuant to SUP. CT. R. 37.6, counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

highways.[2] Second, through a balancing analysis it is easily seen that the interests of the individual impacted by a full custodial arrest far outweigh the state's interest in having one where a licensed driver is a resident, can be sufficiently identified, and is willing to sign a promise to appear. Even in light of the language of *Whren v. United States*, 517 U.S. 806, 816-18 (1996), stating that ordinarily a balancing analysis is not appropriate where probable

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[2] This Court has undertaken two basic methods for analyzing searches and seizures under the Fourth Amendment. The Court has examined the common law in effect at the time the Fourth Amendment was framed, *see, e.g., Wilson v. Arkansas*, 514 U.S. 927 (1995); *Payton v. New York*, 445 U.S. 573 (1980); *United States v. Watson*, 423 U.S. 411 (1976); *United States v. Robinson*, 414 U.S. 218 (1973); *Chimel v. California*, 395 U.S. 752 (1969); *Carroll v. United States*, 267 U.S. 132 (1925), and sometimes the development of the common law since. *See, e.g., Payton*, 445 U.S. at 591 n.33; *Watson*, 423 U.S. at 419-22. The Court has also conducted a balancing analysis, weighing the states's law enforcement interests against the individual's interests in light of the intrusion and whether or not the intrusion advances the state's interests enough to justify it. *See, e.g., Maryland v. Wilson*, 519 U.S. 408 (1997); *Tennessee v. Garner*, 471 U.S. 1(1985); *Winston v. Lee*, 470 U.S. 753 (1985); *United States v. Hensley*, 469 U.S. 221 (1985); *Delaware v. Prouse*, 440 U.S. 648 (1979); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Camara v. Municipal Court*, 387 U.S. 523 (1967). To a lesser extent, the Court has also examined the acceptance of a law or practice among the ..ites, *see, e.g., Garner*, 471 U.S. at 15-18; *Payton*, 445 U.S. at 598-600; *Watson*, 423 U.S. at 419, and Congress, *see, e.g., Payton*, 445 U.S. at 601; *Watson*, 423 U.S. at 415-16, 423.

This Brief presents a balancing analysis. It is believed that Petitioner will present a thorough and complete analysis under the common law and *Amicus* expressly adopts and agrees with that analysis. In keeping with Sup. Ct. R. 37.1, however, *Amicus* presents no argument thereon.

cause exists, a balancing analysis is appropriate in this case because this arrest was "extreme." *See id.* at 818. The arrest is extreme because it does absolutely nothing to further the state's interests.

Where traffic violations are concerned, in the majority of states the officer has a choice of whether to have the driver sign a promise to appear or to affect a full custodial arrest. Ordinarily, traffic citations carry only a fine as the maximum punishment. Both of these aspects of traffic offenses – officer discretion to arrest and only a fine as punishment – are indicative of the state's reduced interest in custody on traffic citations. The paramount state's interest in affecting a full custodial arrest on any offense is to ensure that the defendant will appear in court. Where a driver is licensed, is a resident who can be reasonably identified by the officer, and is willing to sign a promise to appear, the state's interest in ensuring that the driver will appear in court is satisfied. That interest cannot be additionally furthered through a custodial arrest sufficiently to justify such an increased seizure. Nor can any other state's interests justify a full custodial arrest. This is due in part to other pronouncements from this Court giving police officers the power to control and investigate persons in an automobile as well as the automobile itself. Because the difference in magnitude between a stop and a full custodial arrest is so large, the fact that this additional step does virtually nothing to further the state's interest in ensuring the driver's appearance in court makes this seizure "extreme" such that a balancing analysis is appropriate. *See id.*

The statutes giving police officers the authority to arrest for traffic citations are not "facially" unconstitutional, but only as applied in this case. *See Tennessee v.*

Garner, 471 U.S. 1, 11 (1985). Thus, two possible frameworks for applying them in a constitutional manner are presented at the end of this brief – an "articulable reasons for custody" rule based upon the type of analysis found in *Terry v. Ohio*, 392 U.S. 1, 21 (1968) and a "bright-line rule with exceptions" analysis such as that found in *Tennessee v. Garner*. *See id.* at 11-12.

ARGUMENT

I.

IN ADDITION TO IMPLEMENTING THE COMMON LAW RULE ON MISDEMEANOR ARRESTS, THIS COURT SHOULD PERFORM A FOURTH AMENDMENT BALANCING ANALYSIS

This Court has time and time again recognized that where the constitutionality of a seizure is concerned, the Court "must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (quoting *United States v. Place*, 462 U.S. 696, 703 (1983) and citing *Delaware v. Prouse*, 440 U.S. 648, 654 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976); *see also Maryland v. Wilson*, 519 U.S. 408, 411 (1997); *Graham v. Connor*, 490 U.S. 386, 396 (1989); *Winston v. Lee*, 470 U.S. 753, 758-63 (1985); *United States v. Hensley*, 469 U.S. 221, 228 (1985); *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975); *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968); *Camara v. Municipal Court*, 387 U.S. 523, 534-35 (1967). The intrusion, also, must actually further the government's stated interests. *See Garner*, 471 U.S. at 10; *Prouse*, 440 U.S. at 661; *Forrester v. City of San Diego*, 25 F.3d 804, 814 (9th Cir. 1994), *cert. denied*, 513 U.S. 1152 (1995). This balancing has been said to be inherent in the analysis of whether a seizure is "reasonable." *See Mimms*, 434 U.S. at 108-09 ("The touchstone of our analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.' Reasonableness, of course, depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.' ") (quoting *Terry*, 392 U.S. at 19; *Brignoni-Ponce*, 422 U.S. at 878). The "overriding function of the Fourth Amendment," this Court has said elsewhere, "is to protect personal privacy and dignity against unwarranted intrusion by the State." *Schmerber v. California*, 384 U.S. 757, 767 (1966).

The first issue that must be resolved, however, is whether a balancing analysis even applies to this case because, admittedly, Officer Turek had probable cause to arrest Gail Atwater for the seatbelt violation. *See Whren v. United States*, 517 U.S. 806, 816-18 (1996). Where probable cause exists, this Court held in *Whren*, "[T]he only cases in which we have found it necessary actually to perform the 'balancing' analysis involved searches or seizures conducted in an extraordinary manner, unusually harmful to an individual's privacy or even physical interests. . . . " *Id.* at 818. *Amicus* would suggest that this is just such a case and that a balancing analysis can and should be undertaken.

First of all, the probable cause existed here, as did the power to arrest, because they were established by Texas statutory law. *See* TEX. TRANSP. CODE ANN. § 543.001 (Vernon 1999) (arrest without warrant authorized) & § 545.413

(Vernon 1999) (it is an offense not to wear a seatbelt). No state law should be insulated from constitutional review by this Court merely because it purports to justify a particular type of seizure by probable cause also created by that law. Probable cause should not operate to "immunize a constitutional violation." *Atwater v. City of Lago Vista*, 195 F.3d 242, 247 (5th Cir. 1999) (Garza, J., dissenting), *cert. granted*, 120 S.Ct. 2715 (2000).

Secondly, the type of seizure found in this case *is* extraordinary. It is extraordinary because the seizure cannot be said to further any legitimate law enforcement interest. Where a resident driver is stopped for a fine-only traffic offense and the officer confirms the driver's identity and the driver is willing to sign the citation thereby agreeing to appear in court on the offense, a custodial arrest can do nothing more to further the State's interests *as they pertain to that violation*. And even if it can be argued that some governmental interest is forwarded in some marginal way, this still cannot justify the massive additional step between issuing a citation and conducting a full custodial arrest. Bearing in mind that the probable cause is based solely upon a fine-only traffic code violation, a full custodial arrest in the vast majority of cases is simply too extreme. Whether or not the custodial arrest itself is "conducted in an extraordinary manner," *Whren*, 517 U.S. at 818, the *fact* of the custodial arrest in this context is itself extraordinary. This Court should therefore conduct a balancing analysis under the Fourth Amendment.

A. The Effect On The Interests of the Individual In An Arrest Versus A Citation is Profound.

This Court has rightly recognized that an arrest is a most serious intrusion upon one's privacy as well as the rights contemplated by the framers of the Fourth Amendment. In *United States v. Dionisio*, 410 U.S. 1 (1973), this Court observed that an arrest "is abrupt, is effected with force or the threat of it and often in demeaning circumstances, and . . . results in a record involving social stigma." *Id.* at 10 (quoting *United States v. Doe*, 457 F.2d 895, 898 (2d Cir. 1972), *cert. denied*, 410 U.S. 941 (1973)). In another case, this Court stated, "Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends." *United States v. Marion*, 404 U.S. 307, 320 (1971). In *United States v. Watson*, 423 U.S. 411 (1976), Justice Powell opined, "An arrest . . . is a serious personal intrusion regardless of whether the person seized is guilty or innocent. Although an arrestee cannot be held for a significant period without some neutral determination that there are grounds to do so, . . . no decision that he should go free can come quickly enough to erase the invasion of his privacy that already will have occurred." *See id.* at 428 (Powell, J., concurring).

The commentators are in agreement with the Court on the nature of the invasion that goes along with a full custodial arrest. One commentator has observed the arrest in these terms:

> Any arrest has a profound and long-lasting effect on the arrestee. Even if an arrest is for a

minor offense, and charges against the arrestee are ultimately dropped or the arrestee is acquitted, the records of the arrest probably will be retained and disseminated. Moreover, widespread public feeling that "where there's smoke, there's fire" often leaves a cloud of suspicion hanging over an arrestee even if no conviction follows. . . .

A custodial arrest is an especially "awesome and frightening" experience. The arrestee is abruptly constrained and usually searched, even if the arrest is for a minor offense. He is then forcibly taken to an unfamiliar place, booked, fingerprinted, photographed, searched more extensively, and held in jail, possibly under unsanitary and unsafe conditions, until, and unless, he can obtain his release. The arrestee may suffer emotional distress and public humiliation, and may lose contact with family and friends. He may lose time from work and will probably be required to obtain an attorney and spend money on bail. If the detention is at all prolonged, he may lose his job or suffer other adverse consequences.

> If a person charged with a misdemeanor is subjected to a custodial arrest, that arrest is likely to be the major consequence suffered by that person.

William A. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 Mo. L. Rev. 771, 797-800 (1993); *see also* Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 Temple L. Rev. 221, 264 (1989) ("In a society in which freedom and independence are valued, arrest is the greatest of indignities."). Professor Salken said the following about custodial arrests:

> The physical restraint on freedom is not all that an arrested person suffers. Personal privacy is also violated. A person arrested is booked; a record is made of the arrest, usually including fingerprints and sometimes photographs. The record may be permanent, whether or not the individual is ultimately convicted of the offense for which he or she is charged. The arrestee will certainly be searched. Although the search may be limited to a frisk, it is nonetheless more than a "petty indignity" as "the officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, the groin . . . , and entire surface of the legs down to the feet." Probably a more extensive search will be conducted. In addition to a search of the person's body, the police may look in pockets, in any containers that may be in those pockets, and in a purse or briefcase. The search of a traffic offender will extend to the person's car and anything inside the car. The intrusion on privacy is complete.

Salken, *supra*, at 264 (citations omitted).

As jail time is not even in the range of punishment, the custodial arrest will most assuredly be the "major consequence" for persons like Gail Atwater. In Tarrant County, Texas, for instance, it may at present take several hours to book in and out of jail. *See* Fort Worth Star-Telegram, November 4, 1998, "Jail Stealing Their Time, Officers Say," at B1 (reporting book-in delays as long as two hours). The fact is that one can easily stay in jail overnight on an arrest, even when every part of the system (bonding, etc.) works perfectly. And to the extent that Professor Schroeder's portrayal of the arrest and its effects may seem hyperbolic to persons who work within

or are familiar with the criminal justice system, it is a safe bet that it is an accurate depiction of what somebody in Gail Atwater's shoes might very well think and feel at the time the officer tells her she is under arrest.

B. Where The Driver is a Resident Who Is Willing To Sign A Promise To Appear And The Officer Can Reasonably Ascertain His Identity, The State's Law Enforcement Interests Are Not Any More Furthered By A Custodial Arrest Than By A Citation.

Balanced against these personal interests are the state's interests. As in other states,[3] in Texas, the vast majority of regulatory traffic offenses and automobile

[3] At least twenty-eight states have statutes that, like Texas, give the officer on the street either virtually or absolutely unlimited discretion in deciding whether to issue a citation to a traffic violator or affect a full custodial arrest. *See* Barbara C. Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses*, 62 TEMPLE L. REV. 221, 249-52 (1989) (listing all of the states in two categories – unlimited discretion (28 states) and some limits on discretion (22 states)). This Court has observed, however, "that no Act of Congress can authorize a violation of the Constitution." *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973). The same is no doubt true of acts of states, and in fact on several occasions this Court has struck down the laws of many states at once when it was determined that those laws violated the Fourth Amendment. In *Payton v. New York*, 455 U.S. 573, 598-99 (1980), for example, this Court declared unconstitutional the current practices of twenty-four states that permitted the type of warrantless home arrests examined in that case. Some twenty states at the time permitted the use of deadly force on fleeing felons that was declared unconstitutional in *Tennessee v. Garner*, 471 U.S. 1, 15-18 (1985). *See also Knowles v. Iowa*, 525 U.S. 113, 116 (1998) ("The question we therefore address is whether the search at issue, authorized as it was by state law, nonetheless violates the Fourth Amendment.").

equipment violations are fine-only (not less than $1 nor more than $200) misdemeanors. *See* TEX. TRANSP. CODE ANN. § 542.401 (Vernon 1999). This is a reflection of the legislature's opinion of the severity of the offenses. *See Welsh v. Wisconsin*, 466 U.S. 740, 754 (1984). In *Welsh*, this Court noted that the grade of the offense (driving while intoxicated, a fine-only regulatory offense in Wisconsin) could not justify a warrantless home arrest. *See id.* The following observations, made by the Court in *Welsh*, are quite relevant to this case:

> The State of Wisconsin has chosen to classify the first offense for driving while intoxicated as a noncriminal, civil forfeiture offense for which no imprisonment is possible. This is the best indication of the State's interest in precipitating an arrest, and is one that can be easily identified both by the courts and by officers faced with a decision to arrest. Given this expression of the State's interest, a warrantless home arrest cannot be upheld simply because evidence of the petitioner's blood-alcohol level might have dissipated while the police obtained a warrant.

Welsh, 466 U.S. 754. Of course we are not here examining a warrantless arrest in the home, which will receive more scrutiny than a warrantless arrest in public. *Compare Payton v. New York*, 445 U.S. 573, 586-87 (1980) (warrantless arrests in the home) *with United States v. Watson*, 423 U.S. 411, 423 (1976) (warrantless arrests in public). But we are also not here examining an arrest for the offense of driving while intoxicated, an offense which is obviously much more hazardous to the public than the failure to wear a seatbelt (punishable in Texas by a fine of not less than $25.00 and not more than $50.00). *See* TEX. TRANSP. CODE ANN. § 545.413(d) (Vernon 1999).

It would be quite a stretch indeed to characterize the act of driving without one's seatbelt fastened as a "breach of the peace" or a "continuous danger." Nonetheless, in every case a police officer may, at his sole discretion, affect a full custodial arrest. *See* TEX. TRANSP. CODE ANN. § 543.001 (Vernon 1999). What are a State's interests in her police officers having the discretionary power to effect a full custodial arrest for a fine-only traffic offense where the driver's identity is known and he is willing to sign an agreement to appear in court?

1. The State's Interest in Fixing the Identity of the Offender and Ensuring That He Will Appear in Court Cannot Support a Full Custodial Arrest For a Fine-Only Traffic Violation.

The government no doubt has an interest in fixing the identity of a defendant and ensuring that he will appear in court to answer the charges against him. By many accounts, this is the number one reason for arrest. *See, e.g., Albright v. Oliver*, 510 U.S. 266, 278 (1994) (Ginsburg, J., concurring) ("The purpose of an arrest at common law, in both criminal and civil cases, was 'only to compel an appearance in court'. . . .); Schroeder, *supra*, at 834 ("In the course of the last century, arrest has come to be viewed primarily as a means of making the arrestee available to answer a charge or accusation against him."); Salken, *supra*, at 266 ("The government's interest in insuring the defendant's presence at the trial is strong and legitimate."); Horace L. Wilgus, *Arrest Without A Warrant*, (pt. 1), 22 MICH. L. REV. 541, 543 (1924) (arrest defined as "the apprehension or taking into custody of an alleged offender, in order that he may be brought into the proper court to answer for a crime"); 4 WILLIAM BLACKSTONE,

COMMENTARIES ON THE LAWS OF ENGLAND *286 (central purpose of arrest is to ensure suspect's presence at trial). Custodial arrest is certainly a means by which this is accomplished. When a person is arrested and booked, there can be no doubt that in the vast majority of cases, the true identity of the defendant is fixed and he is keenly aware that he needs to appear in court.

When a police officer pulls a driver over for a traffic violation, he asks for the driver's license. He invariably then goes back to his car and runs a computer check on the license to see whether it is valid and whether it is clear of warrants. If he does not have the ability to do this in his car, he radios the station, where someone does it for him. If the driver's license is clear and in good order, the police officer knows exactly who he is dealing with (due in no small part to the fact that the license has a picture on it). The driver's identification is "fixed." Upon issuance of a citation, along with the driver's signature indicating that he or she will appear in court, the criminal process has begun. There simply is nothing further to be done to ensure that the driver will appear that could justify the quantum leap in invasiveness between a citation and a full custodial arrest. Further, if the driver thereafter fails to show up for court, then a warrant is issued for his arrest for failing to appear. *See* TEX. TRANSP. CODE ANN. § 543.009(b) (Vernon 1999). Thus, there can be no credible argument that drivers can just ignore traffic tickets and they will go away.

This Court has observed on several occasions that it will consider the extent to which the particular seizure at hand furthers the government's claimed interests as a part of its "reasonableness" analysis. *See, e.g., Knowles v. Iowa*, 525 U.S. 113, 116-19 (1998) (finding that this "search

incident to citation" did not sufficiently further the twin goals of search incident to arrest – officer safety and the collection of evidence of the offense); *Garner*, 471 U.S. at 9-12 (finding that using deadly force to effect an arrest actually is counterproductive to the purposes for arrest); *United States v. Place*, 462 U.S. 696, 703 (1983) (governmental interests did not support the length of the detention in question); *Florida v. Royer*, 460 U.S. 491, 500 (1983) (Plurality Op.) ("[I]nvestigative methods employed [by law enforcement] should be the least intrusive means reasonably available [to effect the stated purpose, which in this case was a stop]."); *Delaware v. Prouse*, 440 U.S. 648, 659-60 (1979) (discovering unlicensed drivers not sufficiently accomplished by system of "spot checks" not supported by probable cause to withstand Fourth Amendment analysis). Under this rationale, a custodial arrest for a fine-only traffic violation where the driver is a resident who can be identified at the scene and is willing to sign a promise to appear must be viewed as unreasonable under the Fourth Amendment, as the custodial arrest does nothing more to ensure appearance than would the citation.

Of course, where the person cannot be reasonably identified, the opposite could be true, as the state's interest in ensuring the driver's appearance in court may not be satisfied through the issuance of a citation. For example, if the driver has a license but is not carrying it, then the police officer may or may not be able to fix the driver's identity through means of other identification along with a computer check.[4] Where the driver is from

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[4] In the case at bar, Gail Atwater did not have her operator's license with her at the time of her arrest, as she had her purse stolen two days before. *See Atwater v. City of Lago Vista*, 195 F.3d 242, 248 (5th Cir. 1999) (Wiener, J., dissenting), *cert. granted*, 120 S.Ct. 2715 (2000). Nonetheless, Officer Turek obviously knew her and she was able to produce a checkbook with her driver's license number and home address on it – quite enough to pull her record on the computer and confirm that she was who she said she was.

out of state and thus not so easily arrested if he fails to appear in court, the state's interest may not be satisfied. Likewise, where the driver refuses to sign the citation indicating that he will appear in court, the central purpose of arrest is obviously frustrated. Where the resident driver with a valid driver's license is concerned, however, and that person is willing to sign an agreement to appear in court, the full custodial arrest is redundant.

2. No Other Legitimate Law Enforcement Interests Can Justify The Arrest.

Other state law enforcement interests in the arrest versus citation context have been mentioned, although they are always secondary to the interest in ensuring the defendant's appearance at trial. *See, e.g.*, Salken, *supra*, at 266 (identifying the additional governmental interests in obtaining evidence of the crime, preventing future harm, providing social service functions, and maintaining proper respect for law and for the police); Brief of Respondent, *Ricci v. Village of Arlington Heights*, No. 97-501, 1998 WL 134006 at *20-21 (an arrest is a means by which an officer can assert control over potentially threatening situation). As with the government's interest in ensuring the driver's presence at trial, however, the power to arrest on the actual traffic violation does nothing to further these interests, either.

"Preventing future harm" and "controlling a potentially threatening situation" appear to be one and the same. This is a valid state law enforcement interest. Performing a custodial arrest for a traffic violation, however, is a very indirect way to further it. If there exists a dangerous situation or if a person appears prepared to breach the peace or pose a danger to the officer or others, then, as outlined below, some other law certainly exists to directly address that threat. *See, e.g., Terry*, 392 U.S. at 22-27 (clearly giving police the power to address a potentially dangerous situation).

The government's interest in collecting and preserving evidence of the offense for use at trial is also a legitimate interest that is recognized by this Court. *See United States v. Robinson*, 414 U.S. 218, 234 (1973). However, this Court has also recognized the obvious reality that there will not be any evidence of a traffic offense to collect and preserve. *See Knowles*, 525 U.S. at 118. Because of this, and because of the reduced threat to officer safety during a traffic stop where a citation is given, the two historical rationales of the search incident to arrest are not sufficient to justify a search incident to arrest where a traffic citation is issued. *See Knowles*, 525 U.S. at 116-17. Before the citation is issued, however, in most states the police officer making the stop has probable cause to arrest and can therefore conduct a full search incident to arrest as soon as the driver is pulled over. *See Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980) (search incident to arrest need only be justified by probable cause to arrest and need not occur after formal arrest); *see also, e.g., United States v. Lugo*, 170 F.3d 996, 1000-03 (10th Cir. 1999) *and Williams v. State*, 726 S.W.2d 99, 99-101 (Tex. Crim. App. 1986) (giving *Rawlings* precisely that interpretation in the

traffic stop context). This, as many have recognized, gives police officers the ability to use a traffic violation as a pretext in order to conduct a search for other evidence not involving the traffic violation.[5] But because these searches are technically supported by probable cause, this Court has instructed that the police officer's motives cannot be questioned. *See Whren*, 517 U.S. at 812.

As a tool for creating uniformity in the analysis of police stops, the fact that probable cause will support a stop or search regardless of the police officer's motives is

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[5] Professor LaFave has observed:

> There is a much more powerful reason for being concerned about the unquestioned application to traffic violation cases of the "general authority" to search incident to arrest. "There is," as the *Robinson* dissenters properly emphasized, "always the possibility that a police officer, lacking probable cause to obtain a search warrant, will use a traffic arrest as a pretext to conduct a search." Given the fact, as they noted, that "in most jurisdictions and for most traffic offenses the determination of whether to issue a citation or effect a full arrest is discretionary with the officer," and that "very few drivers can traverse any appreciable distance without violating some traffic regulation," this is indeed a frightening possibility. It is apparent that virtually everyone who ventures out onto the public streets and highways may then, with little effort by the police, be placed in a position where he is subject to full search. Nor is one put at ease by what evidence exists as to police practices in this regard; it is clear that this subterfuge is employed as a means for searching for evidence on the persons of suspects who could not be lawfully arrested for the crimes of which they are suspected.

WAYNE R. LAFAVE, SEARCH AND SEIZURE § 5.2(e) (3d ed. 1996) (citations omitted).

useful. Subjective motives on the part of the police are (for a number of reasons) very difficult to prove in the first place, thereby making a workable standard to apply across the board a near impossibility. But one must admit, however, that using a traffic stop as a mere excuse to go on a fishing expedition through the passenger compartment of a driver's car searching for any contraband he may (or may not) find is, at least as a concept, repugnant to the Constitution. *See Sibron v. New York*, 392 U.S. 40, 63 (1968) ("It is axiomatic that an incident search may not precede an arrest and serve as part of its justification."). This practice really does show a remarkable resemblance to the general warrants and writs of assistance so despised by the framers of the Constitution. *See* Salken, *supra*, at 254-58 (detailing history of the writs of assistance and general warrants and their contribution to both the American Revolution and the framing of the Fourth Amendment). Nonetheless, this practice is widely used by police departments, and anecdotal studies are beginning to emerge showing the abuses inherent in such a practice. *See, e.g.*, David A. Harris, *Driving While Black: Racial Profiling on Our Nation's Highways* (June 1999) at 13, available at *www.aclu.org/profiling/report* (detailing one incident where a black man was stopped for not wearing a seatbelt and the police officers dismantled his car searching for contraband – finding none, they left the driver with a screwdriver to repair his car); William H. Buckman & John Lambreth, *Challenging Racial Profiles: Attacking Jim Crow on the Interstate*, THE CHAMPION (Sept./Oct. 1999) (speaking to the general problem of racial profiling). Such police activities are not subject to review under the Fourth Amendment where the state law gives

them probable cause to arrest for a traffic violation. *See Whren*, 517 U.S. at 812-13.

Upon arrest, the state's law enforcement interests justifying a search incident to that arrest are clearly legitimate. *See Robinson*, 414 U.S. at 234. The state, however, cannot and should not be able to claim a legitimate interest in conducting an arrest simply to justify such a search. Certainly such a claim could not be justified by the traditional reasons for a search incident to arrest – officer safety and preserving evidence of the offense. *See id.* Conducting a traffic stop as a pretext to be able to search, while not a valid basis of review under the Fourth Amendment, *see Whren, supra*, cannot be raised to the status of a "legitimate state interest" for purposes of Fourth Amendment balancing. The state is therefore left with the traditional justifications for a search incident to arrest, which do not apply to a situation where a citation is issued. *See Knowles*, 525 U.S. at 117.

Another state interest that cannot be considered legitimate is the police officer's personal interest in "teaching the driver a lesson" by conducting an arrest.[6] *See Atwater*, 195 F.3d at 250 (Wiener, J., dissenting) (citations omitted). Dovetailing into this interest is the interest of a state in having its citizens possess the proper respect for law enforcement. *See* Salken, *supra*, at 271-72. Respect for police officers is on the whole warranted and their advice should generally be followed by the citizenry. In fact, under some circumstances, it can be a crime not to do so.

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[6] This appears to have been Officer Turek's interest in this case. *See id.* at 248. Citing *Whren*, the majority in *Atwater* refused to review Officer Turek's behavior. *See id.* at 244-45 (citing *Whren*, 517 U.S. at 817). Note that the record does not disclose that Gail Atwater was disrespectful to Officer Turek in any way.

See, e.g., TEX. PENAL CODE ANN. § 38.02 (Vernon 1999) (refusing to identify oneself to a police officer is an offense). Likewise, disrespect for the police could reach the point where a breach of the peace actually occurs. *See, e.g.*, TEX. PENAL CODE ANN. § 42.01 (Vernon 1999) (disorderly conduct). However, *Amicus* would be surprised to find that in any jurisdiction in the United States it is an offense not to respect (or to even be directly disrespectful to) a police officer. *See, e.g.*, TEX. PENAL CODE ANN. § 38.15(d) (Vernon 1999) (it is a defense to prosecution for interfering with a public servant if that interference was by speech alone). And if such a law actually exists, *Amicus* would be even more surprised if, upon review, this Court gave that law its stamp of approval. *See* U.S. CONST. amend. I. Punishment is a matter for courts and juries, not police officers. *See Atwater*, 195 F.3d at 250 (Wiener, J., dissenting); Salken, *supra*, at 272.

In response to the question of whether circumscribing the power to conduct a full custodial arrest for a traffic ticket would somehow diminish the respect that citizens have for law enforcement, *Amicus* would submit that the majority of people on the roads probably do not have the slightest idea that they can be arrested for a minor traffic violation. And even if they do, how can the power to arrest for a traffic offense engender respect for law enforcement? Bart Turek's actions in this case have done little to increase the citizenry's respect for law enforcement. And even where the officer does not have a personal agenda the connection between custodial arrests for traffic offenses and respect for law enforcement is tenuous to say the least.

3. Because of Other Pronouncements of This Court As Well As Other Applicable State laws, The Impact on "Effective Law Enforcement" From Granting Petitioners' Relief in this Case Would Be Marginal at Best.

The illusory nature of the government's interests in a custodial arrest for a fine-only traffic violation is further demonstrated through an examination of other laws that apply to traffic stops and give police further investigatory powers. For instance, even if the discretionary power to conduct custodial arrests for traffic violations were shorn away from our law enforcement officers, they would still have the power to *stop* a driver upon seeing such a violation. *See Whren*, 517 U.S. at 818. This would apply even if the officer was stopping the driver for some other reason besides the traffic violation. *See id.* at 813. Upon being stopped, the officer may ask the driver, as well as the passengers, to step out of the car. *See Maryland v. Wilson*, 519 U.S. 408, 414-15 (1997); *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977). If the officer has reasonable suspicion at that point to believe any of the occupants of the car is armed, he may do a protective sweep of the entire passenger compartment of the car. *See Michigan v. Long*, 463 U.S. 1032, 1049-50 (1983). He, of course, may do the same with the body of the driver and passengers. *See Terry*, 392 U.S. at 27. If, during the protective search of the car, the officer should "discover contraband other than weapons," he may arrest whoever is found to possess it. *Long*, 463 U.S. at 1050. At this point, the officer would have the power to conduct a full search incident to arrest not only of the arrested person, *see Robinson*, 414 U.S. at 236, but of the entire passenger compartment of the automobile as well as all containers found within. *See New*

York v. Belton, 453 U.S. 454, 460 (1981). Of course, the police officer may always just ask for consent to search the entire car. *See Ohio v. Robinette*, 519 U.S. 33, 35 (1996). And it goes without saying that once an officer is standing next to the car, if probable cause develops for some other reason (e.g., because of contraband in plain view, marijuana smoke emanating from the car, etc.), then the officer may search the entire car to the extent that he could with a warrant, *see United States v. Ross*, 456 U.S. 798, 823 (1982), including any "containers within it where [the officer has] probable cause to believe contraband or evidence is contained," whether in the passenger compartment or in the trunk, *see California v. Acevedo*, 500 U.S. 565, 580 (1991), or in secret compartments, such as behind the upholstery of the car's seats. *See Carroll v. United States*, 267 U.S. 132 (1925). In light of all these police powers that would be in no way affected, it cannot be reasonably argued that to deny their power to automatically arrest for fine-only traffic violations would "constitute an intolerable handicap for legitimate law enforcement." *Gerstein v. Pugh*, 420 U.S. 103, 113 (1975).

Likewise, if the police officer is facing a situation where a driver is an obvious danger or is breaching the peace, chances are the driver is committing some other offense for which arrest is entirely reasonable. For example, the offense of driving while intoxicated, upon first conviction, is a Class B Misdemeanor in Texas with a range of punishment of 72 hours to 180 days in jail and up to a $2,000 fine. *See* TEX. PENAL CODE ANN. §§ 12.22 & 49.04 (Vernon 1999). For those who refuse to show the officer their license or lie about their identity, refusing to identify oneself to a police officer is a Penal Code offense in Texas, a Class B Misdemeanor punishable by up to six

months in jail and up to a $2,000 fine if that person has an outstanding warrant for his arrest. *See* TEX. PENAL CODE ANN. §§ 12.22 & 38.02 (Vernon 1999). Obstructing a highway or not moving one's vehicle when told to by an officer is a Class B Misdemeanor in Texas. *See* TEX. PENAL CODE ANN. § 42.03 (Vernon 1999). Fleeing in an automobile from a police officer who is attempting to make a lawful stop is a Class A Misdemeanor in Texas, carrying a range of punishment of up to a year in jail and up to a $4,000 fine for a first offense, a felony thereafter. *See* TEX. PENAL CODE ANN. §§ 12.21 & 38.04 (Vernon 1999). Even the offense of reckless driving carries a possible jail term. *See* TEX. TRANSP. CODE ANN. § 545.401(b) (Vernon 1999) (up to 30 days in jail). A custodial arrest for any of these offenses would be entirely reasonable (assuming probable cause existed), for in each case the state's interests in making the arrest are obviously greater and cannot necessarily be satisfied without a full custodial arrest. Not surprisingly, with the exception of reckless driving, the police officer does not even have the option of issuing a ticket on any of the above cited offenses. These could not be considered "regulatory offenses." The vast majority of traffic offenses, however, can be and are.

In sum, where a resident driver has been stopped for a fine-only traffic offense, presents sufficient identification and is willing to sign a promise to appear, it is unreasonable under the Fourth Amendment to subject her to a full custodial arrest. This conclusion is easily arrived at through traditional balancing analysis. The state's interests at that point are clearly outweighed by the individual's because the arrest does absolutely nothing to further them. *Cf. Garner*, 471 U.S. at 10-11. As was

also the case in *Garner*, however, this is not a situation where the laws as they currently stand are facially unconstitutional. *See id.*, 471 U.S. at 11. Therefore, some standard for their application consistent with the Fourth Amendment must be derived. *See id.* at 11-12.

II.

THIS COURT COULD EASILY CRAFT A WORKABLE STANDARD FOR DETERMINING WHEN ARRESTS FOR FINE-ONLY TRAFFIC OFFENSES COULD BE REASONABLE UNDER THE FOURTH AMENDMENT

This Court's prior cases would support at least two possible solutions to the problem under the Fourth Amendment of discretionary arrests for fine-only traffic offenses where the driver may be identified and is willing to sign a promise to appear. One solution would put in place a standard whereby an officer could arrest for the traffic violation if he could articulate reasons why the citation would be insufficient to satisfy the state's interest in ensuring the driver's appearance at trial. The other solution would be a "bright line rule" with exceptions, such as that used in other unreasonable seizure cases from this Court.

A. Solution #1: Formulate a *Terry*-style Constitutional Arrest Justification Standard.

In his dissenting opinion below, Judge Wiener suggested a test for determining the reasonableness of a custodial arrest that is reminiscent of the test first announced in *Terry v. Ohio*, 392 U.S. 1 (1968) for justifying

a stop and frisk.[7] *See Atwater*, 195 F.3d at 249 (Wiener, J., dissenting) (citing *Terry*, 392 U.S. at 21). Judge Wiener conformed the *Terry* standard to the situation where the police officer has made a lawful stop and must choose between issuing a citation or conducting a full custodial arrest. *See id.* Thus conformed, the test is as follows:

> [T]o justify each successive, increasingly stringent intrusion on an individual's liberty and privacy interests, a police officer must at a minimum be able to articulate some reason why it was necessary to effect the further intrusion. The articulated reason does not need to be independent of the reasons that justify the initial intrusions: "The test is whether those interests are sufficiently substantial, not whether they are independent of the interest in investigating crimes effectively and apprehending suspects." But where the identified reasons for both the initial and the successive intrusions are the same, a police officer must be able to advance a plausible claim that the initial intrusions were inadequate fully to serve the proffered governmental interests. If the officer cannot plausibly make that claim – in other words, if there were no legitimate reasons for the further intrusions – then the heightened intrusions are by definition "unreasonable."

Atwater, 195 F.3d at 249-50 (Wiener, J., dissenting).

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[7] "[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, 391 U.S. 1, 21 (1968).

While not a "bright line" rule, this test should not be any harder for the police officer on the street to apply than it would in the stop and frisk context. The "reasonable suspicion" standard enunciated in *Terry* is a substitute for probable cause in a situation where the law enforcement interests are so strong (search for weapons) that an intrusion upon the rights of individuals on a standard less than probable cause is justified. *See Terry*, 392 U.S. at 22-27. What Judge Wiener proposes is to use the same type of standard – even where probable cause to arrest is present – to justify each additional, increasingly invasive step. Applying such a condition upon police conduct even where probable cause is present is not unheard of in Fourth Amendment analysis, *cf. Terry*, 392 U.S. at 28-29 (observing that the Fourth Amendment imposes preconditions upon governmental action); and *see Garner*, 471 U.S. at 11 (even in light of existing probable cause, use of deadly force to affect arrest constitutionally unreasonable).

Judge Wiener's test, however, should be more specific than set out in his dissenting opinion. First of all, it should expressly apply only in situations where the officer has the discretion whether to issue a citation or to effect a full custodial arrest. It is only in this situation where the law enforcement interest in securing the defendant's presence at trial can be fully satisfied without an arrest. If, for instance, the officer cannot verify the driver's identity, then that fact could be an "articulable reason" for going the extra step and arresting the driver. The fact that the driver presented a danger or was breaching the peace may be other possible reasons. Because the officer wanted to teach the driver a lesson, however, would certainly be insufficient. Secondly, it

should only apply to those fine-only regulatory violations such as the type found here, where the state's classification of the offense as fine-only indicates its low interest in arrest and thus the law enforcement interests are far outweighed by the individual's interests protected by the Fourth Amendment.

This test would have the advantage of placing controls on the presently unlimited discretion of the police officer in making the decision of whether to arrest or to issue a citation. It would have the advantage of being an "objective test" and there would be no apparent reason to get into the police officer's subjective intentions, so long as some objective reason to arrest could be articulated. Not being a "bright line rule," this test's contours, as in the case of stop and frisk, would "have to be developed in the concrete factual circumstances of individual cases." *Terry*, 392 U.S. at 29. But there is no reason to believe that the courts would not be able to sort it out.

B. Solution #2: Announce a Bright Line Rule – No Arrests For Fine-Only Misdemeanors.

The alternative would be to announce a bright line rule – where an offense carries only a fine and the police officer is satisfied with the driver's identity and the driver is willing to sign a promise to appear, then the officer cannot affect a full custodial arrest unless probable cause develops from another source. The "other sources" from which probable cause could develop are, for instance, those rules already established in this Court's precedents or that the driver is found to be committing some other crime. *See, supra*, Section I.B.3. This, in effect, would be a bright line rule subject to exceptions such as that announced by this Court in *Garner*, 471 U.S. at 11-12.

In *Garner*, it was held that "[t]he use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable." *Id.* at 11. However, this Court carved out an exception "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others. . . . " *Id.* In this case, the appropriate bright line rule would be: Where the police have the discretion to either arrest or to issue a citation and a person has been stopped for a fine-only offense and he has presented satisfactory identification and is willing to sign a promise to appear, it is constitutionally unreasonable to arrest that person unless probable cause to arrest develops from another source independent of the fine-only offense. The converse, of course, would be true if the officer could not reasonably ascertain the person's identity or he was not willing to sign a promise to appear. There might also have to be an exception for out of state drivers, for in the case of those drivers, an arrest may be more easily justified because of the reduced ability to ensure their presence in court. In the final analysis, however, for the resident, this would be a workable rule and as easy to implement as any bright line rule.

C. Applicability To Other Areas.

Traffic offenses, of course, are not the only fine-only regulatory offenses. *See Ricci v. Arlington Heights*, 116 F.3d 288 (7th Cir. 1997), *cert. granted*, 522 U.S. 1038, *and cert. dismissed*, 523 U.S. 613 (1998). There is no reason to believe that the rule announced in this case would not have applicability outside of traffic offenses. However, the same rationale would apply as well. So long as a police officer has discretion whether to issue a citation or

effect a full custodial arrest and the offense is punishable by a fine, it would be just as unreasonable to arrest a person off the highway as on when the state's interests would be completely satisfied with a citation.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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